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Motion

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 OSCAR RAMIREZ, et al.,

4 Plaintiffs,

5 v.

14 CV 4030 (VEC)

6 M L RESTAURANT, CORP., et al.,

7 Defendants.

8 -----x

9 March 12, 2015
2:30 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13 APPEARANCES

14 JEANNE E. MIRER

15 Attorney for Plaintiffs

16 ROBERT L. KRASELNIK

17 Attorney for Plaintiff Simon Grullon

18 MARTIN E. RESTITUYO

19 ARGILIO RODRIGUEZ

20 Attorneys for Defendants

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1 THE DEPUTY CLERK: All rise.

2 THE COURT: Hello. Please be seated.

3 (Case called)

4 MR. KRASELNIK: Robert Kraselnik for Simon Grullon,
5 plaintiff.

6 THE COURT: Mr. Kraselnik.

7 MR. RESTITUYO: Martin Restituyo for all defendants.

8 THE COURT: Mr. Restituyo.

9 MR. RODRIGUEZ: And Argilio Rodriguez for all
10 defendants.

11 THE COURT: We just got a call from Ms. Mirer telling
12 me that she is running late; she'll be here in a few minutes,
13 so we'll wait.

14 MS. MIRER: Sorry, your Honor.

15 THE DEPUTY CLERK: Counsel, note your appearance of
16 record.

17 MS. MIRER: Jeanne Mirer for plaintiffs Ramirez, et
18 al.

19 THE COURT: Okay, I think we're now all here. Please
20 get to court on time.

21 So we have -- I have two motions, the motion to
22 dismiss, partial motion to dismiss made by the defendants. We
23 have a plaintiff's motion for conditional certification.

24 Here's the order of the day. We're going to start out
25 and I'm going to give you an opportunity to argue the motion to

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1 dismiss, then I'm going to discuss -- this is a little bit of a
2 curve ball, I didn't warn you of this -- subject matter
3 jurisdiction for counts 10 through 13, which are your sexual
4 harassment and pregnancy discrimination claims, which are all
5 brought under state law.

6 Then we'll talk about the motion for conditional
7 certification. Unless somebody says something that is totally
8 not expected, I will then provide you with an oral opinion on
9 the motion to dismiss and the motion for conditional
10 certification. We will then talk schedule going forward. So
11 that's the plan for the day.

12 So Mr. Restituyo, I thought I'd start with the motion
13 to dismiss, and it's your motion. What would you like to tell
14 me?

15 MR. RESTITUYO: Your Honor, I'm not sure how much more
16 we can -- would you like me to stand, first of all?

17 THE COURT: I'm not that formal. Whichever way you're
18 more comfortable and the Court Reporter can hear you.

19 MR. RESTITUYO: So, your Honor, I'm not sure we can
20 add much more than what we've said in our papers.

21 The only thing that I would point out is that, you
22 know, if we choose to -- so the first thing that we have to
23 consider when reviewing the motions is what the Court can
24 consider when determining a motion to dismiss.

25 Ms. Meyer, in her motion, in her opposition to the

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1 motion to dismiss at paragraph nine very adeptly says that a
2 district court may consider the facts alleged in the complaint,
3 documents attached to the complaint as exhibits, and documents
4 incorporated by reference in the complaint.

5 For the remainder of the motion she goes on to cite a
6 whole series of documents that do not meet that criteria. So
7 she, starting at paragraph 19, she cites the affidavit in
8 support of motion for class certification of Omar Taveras,
9 affidavit in support of preliminary injunction for Javier
10 Guerrero, affidavit in support of class certification by Luis
11 Espinol, affidavit in support of class certification by Oscar
12 Ramirez.

13 THE COURT: Understood.

14 MR. RESTITUYO: So none of the documents that she
15 cites purport for the to meet even her own, you know, legal
16 analysis.

17 And so first we would argue that they should not be
18 considered when considering whether the plaintiffs actually
19 allege that the non-Liberato defendants are employers.

20 Secondly, your Honor, you know, based on the four
21 corners of the complaint, and even if you go beyond the four
22 corners of the complaint, certainly the plaintiffs have failed
23 to demonstrate, you know, have failed to allege -- make
24 allegations that are plausible on their face that the
25 defendants, that these non-Liberato defendants were employers.

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1 In fact, there is no allegation sufficient to meet the economic
2 reality test that the Second Circuit abides by. So there is no
3 indication that any of the employers had the power to hire or
4 fire employees, supervise and control employees work schedules
5 or conditions of employment, determine the rate and method of
6 payment, maintain employee records.

7 To point out, you know, the basic -- the common sense,
8 if you will, standard outlined by Irizarry says the Court must
9 be mindful when considering an individual defendant to
10 ascertain that the individual was engaged in the culpable
11 company's affairs to a degree that is logical to find him
12 liable. We don't believe that Ms. Mirer has met that burden
13 for any of the non-Liberato defendants and we would urge your
14 Honor to dismiss.

15 THE COURT: Okay. Ms. Mirer.

16 MS. MIRER: Thank you, your Honor.

17 Let me say this. The complaint that we filed alleged
18 that all of these named defendants were supervisors and/or
19 managers of the plaintiffs. And --

20 THE COURT: But it did that in a very conclusory
21 fashion.

22 MS. MIRER: Well, it said that, but then it laid out
23 all of the particular things that we allege that the supervisor
24 and managers did with respect to the how people were paid, all
25 of the violations of FLSA that we allege. So we allege these

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1 managers were part of what we allege to be the violations of
2 FLSA.

3 THE COURT: But is there any -- maybe I've missed
4 something. Is there any allegation as to what Mr. Restituyo
5 termed the non-Liberato defendants, that they had the authority
6 to set pay, to determine how much a person was going to be
7 paid.

8 MS. MIRER: Stated specifically in the complaint, no?

9 THE COURT: Well, even generally.

10 MS. MIRER: Well, your Honor, let me try to say that
11 when I looked at all of the cases -- and, obviously, this is a
12 motion to dismiss. We have to take my allegations to be true.
13 This is not a national corporation. This is a closely held
14 family corporation in which my clients who are, for the most
15 part, wage -- under paid workers, know who they have to report
16 to, who they have to -- who they talk to about their wages, who
17 they complain to. This is not something where this is a big
18 secret as to who has what authority. And, in fact --

19 THE COURT: No, but if --

20 MS. MIRER: -- if you look at their answer --

21 THE COURT: I'm still focused on what allegations do
22 you want to point me to -- let's take a step back. Simply
23 being a supervisor, do you agree that simply being a supervisor
24 is not sufficient to give rise to FLSA liability?

25 MS. MIRER: Not necessarily under the definition of

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1 the statute.

2 THE COURT: Simply being a supervisor, just you have
3 the title supervisor. You agree that is not sufficient -- the
4 person doesn't have other authority over the employees, simply
5 being a supervisor is inadequate.

6 MS. MIRER: What I'm saying is that for purposes of a
7 FLSA case, the question is whether or not the individual's
8 involvement allows them to have employer status. And --

9 THE COURT: Correct.

10 MS. MIRER: -- as defined by the statute, which is
11 extremely broad and has remedial purposes, and is supposed to
12 be -- the purpose was to be able to bring as many people in who
13 have some type of say in the running of the business, so that
14 there could be some pressure on the company to comply with the
15 law. That's one of the -- that's one of the hallmarks of why
16 there is an expansive definition.

17 What we're saying, your Honor, is that if you look at
18 what has been pled in this case, and not necessarily in the
19 pleadings, but in other things that have been brought before
20 your Honor with respect to specific people, it's very clear who
21 my plaintiffs went to to talk about their pay, to talk about
22 their what kind of hours they had, what their schedule was,
23 when they were supposed to show up at work, what station they
24 were supposed to be at, things --

25 THE COURT: I don't think there's anything that gets

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1 that specific.

2 But why should I consider the information in R
3 affidavits when you did not incorporate it into the complaint,
4 into the third amended complaint?

5 MS. MIRER: Well, let me suggest, your Honor, the
6 third -- most of the cases post Iqbal, and except for some more
7 recent ones, most of the cases post Iqbal have had to do with
8 has the plaintiff stated enough specificity to show that they
9 are entitled to some relief under the statute. The question
10 with respect to defendants has usually arisen in the case of
11 situations where it's really unclear who the defendants are,
12 and who has managerial control. In the --

13 THE COURT: But that has to be in the complaint.

14 MS. MIRER: Your Honor, each time we amended the
15 complaint, we amended the complaint to allege that most, mostly
16 more claims with respect to each of the plaintiffs.

17 All of the cases cited by defendants have said if
18 there is not enough pleading, then it's dismissed, dismissed
19 without prejudice and --

20 THE COURT: As to each -- no. Wait a minute. My
21 rules are very clear that you can't amend -- you can't file a
22 complaint, get a motion to dismiss, not respond -- respond to
23 the motion to dismiss rather than amending. You were on notice
24 that this was the objection of the defendants and you did not
25 amend the complaint --

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1 MS. MIRER: Actually --

2 THE COURT: -- to fix it.

3 MS. MIRER: Actually in their opening brief they did
4 not raise any of the cases that they raised in their reply
5 brief.

6 THE COURT: But you raised the issue that you are
7 not -- that you do not make adequate allegations against the
8 individual defendants.

9 MS. MIRER: Not exactly in their opening brief, your
10 Honor. That was more in the reply brief.

11 But having said that --

12 THE COURT: Are there facts that you have that do not
13 appear in the affidavit, so if I look at the universe, the
14 affidavits that you submitted in support of the preliminary
15 injunction the affidavits that you submitted in support of the
16 collective certification and the complaint --

17 MS. MIRER: Yes.

18 THE COURT: Do I have the universe of facts?

19 MS. MIRER: No, we have actually some more facts that
20 came to our attention yesterday.

21 THE COURT: Well, you know, this -- okay.

22 MS. MIRER: Can I explain what they are?

23 THE COURT: No. They're not in the complaint.

24 MS. MIRER: Well, I have a supplemental affirmation
25 that I prepared to submit to the Court, which shows

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1 conclusively with respect to Fernando Liberato who is also
2 Raphael and Lucila Gomez that they specifically are discussing
3 why it is that, or how it is that the defendants require the
4 plaintiffs to sign false records. And this came to our
5 attention in an audio that was made with respect to a
6 conversation that Ms. Crecencio, Andres Crecencio had with
7 Lucila Gomez and Fernando Liberato.

8 THE COURT: When?

9 MS. MIRER: When was the discussion? The discussion
10 was about a year ago. I didn't find out about it until last
11 night. But she makes reference to similar things in her
12 affidavit. But this is now absolute proof that in fact the
13 audio shows that in fact this has occurred.

14 THE COURT: That what has occurred?

15 MS. MIRER: That Miss Crecencio, Andres Crecencio,
16 Maggie Andres Crecencio --

17 THE COURT: A plaintiff.

18 MS. MIRER: A plaintiff, raised with both Lucila
19 Gomez, her supervisor, and Fernando Liberato, also a manager,
20 why it was that she was required to sign for a \$150 in tips
21 when she did not get \$150 in tips. And they are on tape
22 saying, this is a way we do it, in essence. We have -- I mean
23 I have the actual transcript and the tape -- this is, this is
24 what's required, and besides if you make more than \$150 in
25 tips, we don't take it away from you, and besides, we don't

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1 charge you for lunch. And she said, but I don't get lunch, I
2 get ten minutes to stop working to eat, and I'm --

3 THE COURT: But that still doesn't show that they set
4 the policies.

5 MS. MIRER: Well, you don't have to show that they set
6 the policy.

7 THE COURT: They have --

8 MS. MIRER: For the Carter factors, you don't have to
9 show they set it. They were certainly aware, they were
10 implementing, they were discussing the rationale for it.

11 THE COURT: Implementing it is different from knowing
12 the rationale. You haven't alleged any of that.

13 MS. MIRER: Well, I'm saying this is what they say
14 what the rationale is.

15 THE COURT: Okay.

16 MS. MIRER: They say the rationale is, we don't take
17 your tips if it's over 150, which they're actually not entitled
18 to do anyway.

19 THE COURT: Okay, stay focused. The focus is on the
20 allegations in the complaint against the non-Liberato
21 defendants. That's the focus.

22 If there is anything more that you want to tell me
23 about why I should consider materials that are not in the
24 complaint and not in the existing many affidavits that have
25 submitted, I'm here to hear that.

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1 MS. MIRER: Well, in terms of this other information
2 that I found that I got yesterday as well.

3 THE COURT: And why should I consider that when your
4 client, who is the plaintiff, has had this information for a
5 year you say?

6 MS. MIRER: No, no. I'm talk -- your Honor, I don't
7 speak Spanish. I work with people who speak Spanish. The
8 lawyer, when the -- there's sometimes a gap between what the
9 clients know, maybe need and what I actually need, and it's
10 lost in translation. It's not something that I am, you know,
11 willing -- I'm saying that it's?

12 THE COURT: But, Ms. Mirer --

13 MS. MIRER: Let me --

14 THE COURT: No, wait. The limit is, this complaint
15 was first filed in early 2014.

16 MS. MIRER: No. In June.

17 THE COURT: The original complaint?

18 MS. MIRER: Yes.

19 THE COURT: June.

20 MS. MIRER: June 5th.

21 THE COURT: Mid 2014. So that's nine months ago.

22 MS. MIRER: Yes.

23 THE COURT: Kind of time it takes to have a baby.
24 There comes a point where the complaint has to stop. You've
25 amended it twice. This is the third, three times, third

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1 amended complaint. The defendants are entitled to know what
2 they're defending against. It can't be a moving party where
3 every time Ms. Mirer gets something translated she wants to
4 change the complaint. That's not fair to the defendants.
5 That's not how litigation works.

6 MS. MIRER: Your Honor, with respect to the
7 plaintiffs' claims, as I find out claims I have an obligation
8 to bring them to the attention of the Court and the other and
9 the defendant which I did. And if you look at all of my
10 amendments, they are all with respect to the plaintiffs'
11 claims. And what --

12 THE COURT: But it's the plaintiffs' claims against
13 the defendants.

14 MS. MIRER: Except it's -- I'm sorry.

15 THE COURT: What we're talking about is what you have
16 alleged about particular defendants.

17 MS. MIRER: Right.

18 THE COURT: That's the issue.

19 MS. MIRER: It's disingenuous for the defendants in
20 this closely held corporation to say they don't know that
21 Victor Liberato is a supervisor, controls the hours over at
22 Burnside. And, in fact, we have --

23 THE COURT: But you're the plaintiff.

24 MS. MIRER: I am. I understand that. But let me be
25 clear. There is plenty of case law that says we can make

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1 claims on information and belief if the information is almost
2 exclusively in the control of the defendant -- which it is in
3 this case. They know -- they're not -- obviously they believe
4 Mr. Antonio Liberato has done -- has the power to hire and
5 fire, set schedules, do all that. They're not seeking to
6 eliminate him.

7 But the cases call for allowing defendants who have
8 delegated authority to do these things. And these people have
9 that delegated authority. It's a broad remedial statute. To
10 allow as many defendants who potentially are complicit in the
11 acts -- you know, if Victor Liberato says or Fernando Liberato
12 says we make you sign false records because that's the way we
13 do it, that's not somebody who is completely in the dark about
14 what the policy is.

15 THE COURT: But I don't know that being in the no or
16 in the dark is the issue. That's not the --

17 MS. MIRER: The issue is whether or not there is a
18 plausible claim that these people fit the definition of
19 defendant, and if in fact.

20 THE COURT: Of the employer.

21 MS. MIRER: Of an employer to be a defendant. And
22 what we're saying is that even under Iqbal, to allege it, it
23 has to be considered true. It's not -- there's allegations
24 with respect to each of the things that we allege that the
25 supervisors did.

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1 I think it would be reversible error if the Court were
2 to dismiss without -- with prejudice, in light of the fact that
3 we have submitted to the Court information which has been
4 showing more specifics as to what each of the defendant's role
5 was that were able to find out more through the conditional
6 certification affidavits and who they went to. These are
7 the -- frankly, your Honor, this complaint that I filed in this
8 case is almost identical to ones that I filed for many years,
9 which have never had a problem. So, obviously, it did not
10 occur to me with respect to this defendant, which where we're
11 talking about maybe six or seven people who are basically
12 running this restaurant, that they would think that these
13 people didn't have enough delegated authority to do the kinds
14 of things that they do to make them employers under the Act, to
15 fit within the definition, and that they can't think it's
16 plausible, that this is alleged, to me doesn't make any sense.
17 Under Iqbal, all you have to do is allege enough facts to make
18 it plausible that these folks are, at the pleading stage are
19 employers, are within the definition of employer.

20 THE COURT: But you have to allege facts.

21 MS. MIRER: Well, your Honor --

22 THE COURT: You can't allege conclusions.

23 MS. MIRER: I believe it would be reversible error if
24 this Court would not allow us to amend the complaint to allege
25 the things that we now have more information about and to --

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1 THE COURT: To make the record just to be clear you
2 had the information. You've acknowledged that you had the
3 information.

4 MS. MIRER: We, we have --

5 THE COURT: It's information that your client knew.

6 MS. MIRER: We acknowledge that, for purposes of the
7 complaint, we alleged facts that showed these people who we
8 have named to be supervisors, managers, and we believe within
9 the definition of employer for purposes of FLSA.

10 THE COURT: And as I understand it your supplemental
11 affidavit that you want to -- that you haven't filed, which you
12 want to hand up during the course of oral argument, relates to
13 Victor Liberato and who else?

14 MS. MIRER: Fernando Liberato.

15 THE COURT: Victor Liberato and Fernando.

16 MS. MIRER: And Lucila Gomez.

17 MR. RESTITUYO: Your Honor, for the record there is no
18 Fernando Liberato.

19 MS. MIRER: It's Raphael Liberato. He's known as Fay,
20 I'm sorry. But that's how our people know him as Fay Fernando,
21 that's what they call him.

22 THE COURT: So he's.

23 MS. MIRER: He's Raphael Liberato. That's his actual
24 name.

25 THE COURT: In the complaint he's identified as

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1 Fernando Liberato, right?

2 MS. MIRER: Right. But in their answer to the
3 complaint they identify him as Raphael, which we've accepted.

4 THE COURT: Okay.

5 MS. MIRER: Obviously.

6 THE COURT: Okay. But you don't have any additional
7 facts relative to any of the other various people that you've
8 alleged as defendants.

9 MS. MIRER: Well, with respect to the ones that we've
10 alleged in our response, we certainly say that Nelson Gomez has
11 been -- was identified as somebody who fired --

12 THE COURT: I'm asking you do you have any additional
13 information. I've read everything you've given me.

14 MS. MIRER: Okay.

15 THE COURT: I know everything that you've alleged
16 about each of these people. The facts that you've alleged.

17 MS. MIRER: Uh-huh.

18 THE COURT: Is there anything further?

19 MS. MIRER: With respect to the facts, no.

20 THE COURT: Okay.

21 MS. MIRER: But the only thing I did want to say is
22 that I do have with respect to Victor I did mention that, you
23 have that.

24 THE COURT: As I understand it, it's with respect to
25 Victor, Fernando also known as Raphael, and Lucy Gomez.

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1 MS. MIRER: Correct.

2 THE COURT: Does your supplemental affidavit touch on
3 each on specific statements that each person made?

4 MS. MIRER: Yes.

5 THE COURT: Okay. All right. Have you shared it with
6 Mr. Restituyo?

7 MS. MIRER: I'm about to.

8 THE COURT: Okay. So this is not a good way of
9 practicing law. Again --

10 MS. MIRER: Your Honor --

11 THE COURT: This is -- I haven't seen it. This has
12 been scheduled, this oral argument was scheduled now for two
13 weeks, and you haven't given it to me and you haven't given it
14 to your opponent, which means none of us are prepared to deal
15 with it.

16 MS. MIRER: We have --

17 THE COURT: You're the one who wants this case to go,
18 and yet at each step you slow me down by not providing
19 information in a timely way.

20 MS. MIRER: Your Honor, as I said, we got this
21 information yesterday, and I apologize to the Court and
22 apologize to my opponents. But we were, unfortunately at
23 midnight last night, we were trying to figure out how to get
24 something translated, because that was the problem. And I wish
25 it was otherwise. And it's not like we haven't been working

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1 extremely hard on this case and doing many many things with
2 respect to this litigation.

3 THE COURT: Okay Mr. Restituyo, anything that you like
4 to say?

5 MS. MIRER: May I approach with the --

6 THE COURT: Yes.

7 MR. RESTITUYO: Your Honor, it's very difficult to
8 deal this way. But first I will note that this affidavit, even
9 under Ms. Mirer's reading of the law would be inadmissible to,
10 under consideration for a motion to dismiss. Even under her
11 own argument in her own opposition to the motion to dismiss,
12 this affidavit would be inadmissible.

13 THE COURT: I assume that what she would intend is to
14 say that she should be given leave to amend the complaint yet
15 again, based on this evidence and, therefore, be able to state
16 a claim against Victor and Raphael Liberato and Lucy Gomez. Is
17 that --

18 MS. MIRER: And Nelson, which we have --

19 THE COURT: Who is Nelson?

20 MS. MIRER: Nelson Gomez is the one that fired
21 Mr. Ramirez.

22 THE COURT: I just asked you if there was anything in
23 that other than against these three people and you said no.

24 MS. MIRER: No. I started raising the facts that
25 there had been the testimony and the affidavit from Oscar

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1 Ramirez that he had been fired by Nelson Gomez, and so --

2 THE COURT: That's a different affidavit. Isn't that
3 already in the record?

4 MS. MIRER: That's already in the record, right.

5 THE COURT: Okay. So the question is whether this
6 additional evidence provides additional facts.

7 I assume, to answer to Mr. Restituyo's point, that the
8 argument would be you should be given leave to amend the
9 complaint again because of this newly discovered evidence
10 regarding Victor and Raphael Liberato and Lucy Gomez.

11 Anything about Oscar and Nelson Gomez is not newly
12 discovered. You already had that. You've submitted it in a
13 prior affidavit.

14 MS. MIRER: And in our response to the motion to
15 dismiss.

16 THE COURT: But it's not in the complaint.

17 MS. MIRER: It's not specifically in the complaint,
18 no.

19 THE COURT: Okay.

20 MR. RESTITUYO: One --

21 MS. MIRER: Except for the fact that it does state
22 with respect to Oscar's claims that he was fired by Nelson
23 Gomez. It does state in the complaint that he was fired by
24 Nelson Gomez.

25 THE COURT: What paragraph is that?

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1 MS. MIRER: That would be in the section related to
2 Mr --

3 THE COURT: Give me a particular paragraph.

4 MS. MIRER: I have to pull out the third amended
5 complaint, your Honor.

6 THE COURT: I think the paragraph you're talking about
7 is paragraph 40?

8 MS. MIRER: Yes.

9 THE COURT: Which reads, "On or about December 15th
10 2013, Ramirez was fired shortly after he raised concerns on
11 behalf of himself and his co-workers about the legality of
12 their low wages with his manager, Nelson Gomez."

13 That does not allege that Nelson Gomez fired him. You
14 allege a chronology, not cause. I mean, I can infer cause, but
15 I can't infer that Mr. Gomez fired him. There is no allegation
16 in there that he fired him. If Nelson Gomez was the one who
17 said to Oscar Ramirez you're fired --

18 MS. MIRER: That's what he did, your Honor.

19 THE COURT: But that's not in the complaint.

20 MR. RESTITUYO: Your Honor, that --

21 THE COURT: It's not even close to in the complaint.

22 MR. RESTITUYO: I don't know how much more I should
23 say. But it also misstates the record because there is an
24 affidavit where -- that Ms. Mirer submitted for her clients,
25 wherein Mr. Ramirez states that a co-worker gave him an

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1 envelope and said that they would get -- that he would get a
2 call back, and so he never got a call back.

3 So for her to now misstate the report to say that,
4 that Nelson Gomez fired Oscar Ramirez is

5 THE COURT: Inconsistent with the affidavit.

6 MR. RESTITUYO: Yes.

7 THE COURT: The other affidavit.

8 Okay, anything further, Ms. Mirer, relative to the
9 motion to dismiss?

10 MS. MIRER: Only that I think it would be -- it's
11 disingenuous of the defendant to argue that they have -- that
12 none of these other defendants have any role in the management
13 or control over these plaintiffs, given that --

14 THE COURT: Okay. But that's not the way it works. I
15 mean, they don't have to do anything on a motion to dismiss.
16 It's the plaintiff's obligation to allege sufficient facts so
17 that the Court, when the complaint is tested, can say there's
18 sufficient facts alleged to make -- to state a claim against
19 who, even under your scenario, are lower level employees of the
20 establishment.

21 MS. MIRER: Typically, typically, your Honor, the
22 cases that address, have addressed this have been on summary
23 judgment after there's been discovery.

24 THE COURT: But they're not all --

25 MS. MIRER: No, I understand.

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1 THE COURT: The rules on the complaint are the rules
2 on the complaint, whether it's an FLSA case or an antitrust
3 case, you still have to state a claim. You have to state a
4 claim against each defendant.

5 MS. MIRER: Your Honor, I perfectly understand.

6 THE COURT: Okay.

7 MS. MIRER: I'm just saying that with respect to the
8 remedial nature of the statute, the broad definition of who is
9 an employer that, as has been interpreted by the courts, and
10 giving my complaint the reasonable, all favorable reasonable
11 inferences and other things that this Court knows could be in
12 the record that would support the claims that these individuals
13 had control over the day-to-day operation of the restaurant and
14 these plaintiffs, that this Court should not grant a motion to
15 dismiss. To the extent that there is questions of fact, they
16 should be raised later on summary judgment.

17 THE COURT: Okay. That's just not the law, but --

18 MS. MIRER: Well --

19 THE COURT: Okay.

20 MS. MIRER: Or I should be allowed to amend to add --

21 THE COURT: How many times are you going to be allowed
22 to amend? They're entitled to know what they're defending
23 against. This is now -- we're nine months into the case. So I
24 can tell you that I'm not giving you leave to amend.

25 MS. MIRER: Well, as I said, I believe that's

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1 reversible error.

2 THE COURT: I'll take my chances with the people
3 upstairs.

4 MS. MIRER: Thank you.

5 THE COURT: Anything further, Mr. Restituyo, on this
6 issue?

7 MR. RESTITUYO: No.

8 Just for the record, your Honor, let it be clear that
9 there are 14 plaintiffs, that by the time the third amended
10 complaint was filed had ten months, at least ten months. And
11 Mr. Ramirez's affidavit seems to suggest that they were
12 planning this even before he was terminated in December. So
13 it's fair to say they've had well over a year to get their
14 pleadings right. And now we're in, you know, April or March of
15 2015 when this thing began in December of 2013, presumably, and
16 we believe that the defendants would be significantly
17 prejudiced by giving plaintiffs yet another opportunity to
18 amend the complaint.

19 THE COURT: Okay. Well, my view is that my individual
20 rules are very clear on this issue, that I'm not in the
21 business of rendering, essentially, sort of serial tutorials in
22 terms of how to draft a complaint. That's just not the deal.
23 You had an opportunity, you didn't take it so we are where we
24 are at this point.

25 Let me turn -- I don't think there is anything more to

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1 say on motion to dismiss. I'm not seeing anything from either
2 one of you.

3 Ms. Mirer, so I think when last I saw you I suggested
4 that we would -- that I wanted you to think about, and I was
5 thinking about the notion of severing the sexual
6 harassment/pregnancy discrimination, those counts from
7 everything else because they really are different, and that
8 then caused me to actually pay sharp attention to those counts.
9 First off, do you have a view on whether, assuming the case all
10 stays together, those counts should or should not be severed
11 for discovery in the trial?

12 MS. MIRER: Certainly for trial they could be severed,
13 but not necessarily for discovery.

14 THE COURT: Okay. So when I looked more carefully at
15 those claims, I noted that they are all brought under state
16 law.

17 MS. MIRER: Correct.

18 THE COURT: So my question is, regardless of whether
19 they're severed, why do I have subject matter jurisdiction over
20 those claims?

21 MS. MIRER: Just under supplemental jurisdiction, your
22 Honor, given the fact that in order to file those cases in
23 federal court there would have had to been an EEOC finding and
24 EEOC filing and a --

25 THE COURT: Right to --

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1 MS. MIRER: Right to sue letter. And given the timing
2 of them, they were -- and our need to file all claims that we
3 knew about together, we filed them in this complaint asserting
4 supplemental jurisdiction.

5 THE COURT: Okay. So in order for there to be
6 supplemental jurisdiction, let's all go back to civil procedure
7 right and Gibbs. The claims all have to arise out of a common
8 nucleus of operative facts. That's the test.

9 So tell me why those claims, which strike me for the
10 very reason that I think you agreed they could be severed for
11 trial and the reason it seemed to me they should be severed for
12 trial, is that they really arise out of a whole different set
13 of facts. They arise out of those women's relationship to the
14 alleged harassers. And as to the pregnant employee, it's a
15 one-off issue of whether she was discharged because she was
16 pregnant. But none of that really I mean, persuaded me that
17 all of that has anything to do with whether Liberato restaurant
18 pays overtime, minimum wage in spite of hours, which is the
19 core operative facts that will be being tried in the FLSA case.

20 MS. MIRER: And some retaliation claims.

21 THE COURT: And retaliation claims related to minimum
22 wage, overtime and spread of hours.

23 MS. MIRER: Your Honor, the way we have looked at it
24 is that there is a relationship between the vulnerability that
25 these workers have with respect to their pay, and also with

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1 respect to how they're treated on the job; and that the sexual
2 harassment is part and parcel of the way in which these workers
3 are treated on the job, in conjunction with being vulnerable
4 employees who are making less than minimum wage. That's how I
5 thought of it together, your Honor; that it was -- that these
6 are -- the same people are involved, that they feel that they
7 have to put up with this in order to maintain their jobs.

8 THE COURT: But even the courts that take a very broad
9 view of supplemental jurisdiction do not view all claims that
10 arise out of one employment relationship to be all within
11 supplemental jurisdiction, because they don't all link back to
12 the -- I mean the fact -- accepting the plaintiffs' view of the
13 facts, assume that they are exploited workers. The evidence
14 that's going to be used to prove that is, you know, schedules,
15 cash disbursements, whatever records they have, or the
16 employees' statements about how long they worked and how much
17 they got paid.

18 The fact that they feel exploited, the fact that they
19 don't think they can complain is neither here nor there to the
20 FLSA case. It may be a byproduct of the fact -- I mean the
21 truth is these things, as you know better than anybody, it's
22 all very much mooshed together. The reason that they,
23 undocumented workers are exploited is because they're
24 undocumented workers. And the reason that they can be
25 exploited is because they're undocumented workers. And the

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1 reason that they're willing to work, notwithstanding the fact
2 they're not being paid minimum wage is because they're
3 undocumented workers. And it's a vicious circle that you're
4 doing your part to un-circle. But none of that, that kind of
5 the feeling of helplessness, the feeling of I'm being
6 exploited, I'm being treated badly is not integral to your
7 case. In fact, none of that will even be admissible. What
8 will be admissible is how long did they work, how much did they
9 get paid.

10 MS. MIRER: Having said that, all this means, though,
11 is that if the Court's saying that there's no overlap in facts,
12 that's one thing. But the fact is that some of the same people
13 are involved in --

14 THE COURT: But that's not enough alone, the fact that
15 common witnesses.

16 MS. MIRER: And it arises out of their work on the
17 job.

18 THE COURT: And that's not enough because you can have
19 lots of different claims that arise out of employment on the
20 job.

21 MS. MIRER: The other issue is having to start all
22 over in another court and the judicial economy of not being
23 able to --

24 THE COURT: But if I don't have jurisdiction, there is
25 nothing I can do about that.

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1 MS. MIRER: Well, your Honor, if you don't feel you
2 have jurisdiction, that's one thing. I obviously believe that
3 it fit within the supplemental jurisdiction when I pled it.
4 I'm not trying to, you know, say that all of these things are
5 so interrelated that in terms of how they're paid doesn't
6 contribute to the fact that they were sexually harassed. I
7 mean, I think the Court just eloquently connected the issues
8 the way we would, but you're saying that they're not relevant,
9 and that's --

10 THE COURT: I'm saying that's a psychological
11 connection that is not a common nucleus of operative facts as
12 that term is used by the Supreme Court in Gibbs. I mean, the
13 evidence would not -- aside from the fact that there's overlap
14 of witnesses, which is clearly not enough, the evidence that
15 proves sexual harassment neither proves -- neither increases
16 nor decreases the evidence on the FLSA case. There's
17 absolutely no overlap of evidence between those claims and the
18 FLSA claim.

19 Look, because I sort of popped this on you, I'm
20 prepared to give you time to brief it if you want, okay.

21 MS. MIRER: Uh-huh.

22 THE COURT: Before we get there, Mr. Restituyo, do you
23 want to be heard on this?

24 MR. RESTITUYO: No, your Honor. I see it like the
25 Court sees it. Basically, I don't see the common nucleus of

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1 facts. At best, they make individual allegations, one employee
2 against one person, et cetera. And so especially when you're
3 talking in the class context, which is what Ms. Mirer is
4 seeking, class certification to include these one off
5 individual allegations by one afflicted person allegedly
6 against one particular alleged to be supervisor, I don't think
7 it fits within the --

8 THE COURT: I mean, you understand if I dismiss, it
9 will be a dismissal without prejudice, and if she wants she can
10 walk over to Bronx Supreme and bring the same claim there.

11 MR. RESTITUYO: We understand, your Honor.

12 THE COURT: Okay.

13 MS. MIRER: And it would be against individual
14 defendants that they're now seeking to dismiss in this case.

15 THE COURT: So be it. I'll come back to you, I
16 promise.

17 MR. RESTITUYO: No, no.

18 THE COURT: Ms. Mirer, do I correctly understand that
19 the reason that these claims were not brought under Title VII
20 is because they cannot be, the employees did not complain to
21 EEO?

22 MS. MIRER: They have not filed EEOC charges.

23 THE COURT: They're out of time now, right, on sexual
24 harassment? That was a long time ago.

25 MS. MIRER: Yeah. I mean, they're not out of time on

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1 the state claims.

2 THE COURT: No, no.

3 MS. MIRER: Right.

4 THE COURT: In terms of the federal, the question is
5 whether --

6 MS. MIRER: It would be beyond 300 days, yes, your
7 Honor.

8 THE COURT: Okay, I'm sorry, Mr. Restituyo, I've cut
9 you off.

10 MR. RESTITUYO: No, your Honor. I'm good.

11 THE COURT: Okay. All right. Anything -- I will give
12 you an opportunity to brief this. We'll set -- I'm going to
13 set schedules at the end.

14 MS. MIRER: Okay.

15 THE COURT: Okay. Okay, now let's move to the motion
16 for conditional certification.

17 Ms. Mirer, this is your motion.

18 MS. MIRER: Your Honor, we believe that with respect
19 to conditional certification, it's really a preliminary
20 determination as to which potential plaintiffs may be, in fact,
21 similarly situated to others, and it's a fairly low bar with
22 respect to how that similarly situated nature is met, and I
23 believe with our affidavits, with our pleadings we have met all
24 of those issues. I think the, really, the only issues may be
25 on issues of notice. I don't think the cases that were cited

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1 by defendant really undercut the motion and the claims that we
2 made in the motion.

3 THE COURT: Let me ask you to focus on what is the
4 evidence that the workers at the two restaurants are under
5 similar -- that there is, despite the fact that they seem to be
6 actually owned by separate corporate entities, whatever the
7 entity is that owns them, that it's really one set of policies
8 and procedures and --

9 MS. MIRER: The affidavits that we've submitted -- we
10 have six affidavits from Burnside and the rest are from 183rd,
11 they're -- of our 14 plaintiffs, almost half are from Burnside
12 and they allege a common policy as well.

13 THE COURT: But as between Burnside and --

14 MS. MIRER: And 183rd.

15 THE COURT: 183rd Street.

16 MS. MIRER: Yeah.

17 THE COURT: Okay. And what about the difference -- I
18 didn't make a chart in terms of the job classification. It
19 looked like you had some people that started out as some
20 combination of counter people and wait staff.

21 MS. MIRER: And kitchen staff.

22 THE COURT: And kitchen. Do you have any like
23 delivery men?

24 MS. MIRER: Mr. Gullon is delivery.

25 THE COURT: Is a deliverer man, okay. And dish

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1 washers?

2 MS. MIRER: Oscar Ramirez was a dishwasher.

3 THE COURT: Cooks?

4 MS. MIRER: Javier is a cook.

5 THE COURT: Okay. And they're all subject to the
6 same --

7 MS. MIRER: Yes.

8 THE COURT: -- policies.

9 MS. MIRER: Yes.

10 THE COURT: Okay. Are there any employees at the
11 restaurant that are not subject to that same wage policies? Is
12 this a restaurant that you allege is doing one thing for
13 workers who are documented and a different thing for workers
14 who are undocumented?

15 MS. MIRER: No.

16 THE COURT: Okay. So it's just across the board
17 they're not paying minimum wage and overtime according to the
18 plaintiffs.

19 MS. MIRER: According to the plaintiffs, correct.

20 THE COURT: Okay. One of the issues, before we get
21 sort of -- I'll get to you on substance -- is the notice period
22 which you're seeking I think is 90 days?

23 MS. MIRER: Well, initially when we filed this back in
24 September it was 120 days, but I mean obviously the quicker we
25 can get the notice out and back, the better. It's just enough

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1 time to for people to get it and make a reasoned decision.

2 THE COURT: Right. What is the shortest period that
3 you think you can live with?

4 MS. MIRER: Probably 60 days at the most.

5 THE COURT: How about something shorter than that?
6 That's two full months from the time --

7 MS. MIRER: I mean, it would have to be 45 from the
8 date of the notices, probably the shortest that --

9 THE COURT: You don't think, given the amount of
10 controversy associated with this restaurant, that 30 days would
11 be sufficient?

12 MS. MIRER: It would seem to me that the defendant
13 would want to extinguish all possible claims and want there to
14 be.

15 THE COURT: I'll get to him. I'm asking what you can
16 live with.

17 MS. MIRER: Your Honor, given the passage of time, I'm
18 willing to live with anything as long as it gets out quickly
19 and we can, you know, get it back quickly and we can agree on
20 the notice.

21 THE COURT: Okay. One of the things that you have
22 proposed in your notice is that the notice -- that the date
23 should be the date of the original filing of the complaint
24 which was June, whatever, minus three years. What is the basis
25 for that versus clocking backwards three years from the date of

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1 the notice?

2 MS. MIRER: I'm trying to think. I think it was --
3 this was based on a notice that I did in another case which was
4 based on the date of the filing. So I'd have to double check
5 as to why -- it was based on a notice of that went out in
6 another case that was approved that was based on the date of
7 the filing. I mean, obviously, the statute is still running as
8 to the people who are not opted in yet, so --

9 THE COURT: Right.

10 MS. MIRER: -- I'd have to double check in terms of
11 whether the date of the notice or the date of the filing.

12 THE COURT: Okay. So for right now I just see no
13 basis for equitable tolling from June to now.

14 One of the things that you've asked for in your
15 request is that you want from the defendants the workers'
16 Social Security numbers and telephone numbers. Why?

17 MS. MIRER: I don't need it.

18 THE COURT: You do not need it. Okay, good.

19 And what is your authority for ordering that the
20 defendant post a notice in his restaurant?

21 MS. MIRER: Other than the fact that it's been done in
22 other cases of mine where there was some question as to whether
23 people were able to get regular mail or read and write Spanish
24 or --

25 THE COURT: Or do what?

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1 MS. MIRER: Get regular mail or lot of --

2 THE COURT: Or?

3 MS. MIRER: In terms of -- making sure that it's --

4 THE COURT: I'm trying to -- I didn't understand. You
5 said in terms of whether people can get regular mail or
6 something.

7 MS. MIRER: Whether -- we need to know whether it
8 would be in Spanish for people to be able to understand it.

9 THE COURT: I presume that you're going to want to
10 send it out in English and in Spanish.

11 MS. MIRER: Exactly, yeah.

12 THE COURT: But can only approve English. And, as you
13 all know, I do not speak Spanish. Okay. But other than that,
14 you don't have any authority that says the defendant is -- that
15 I have the authority to order the defendant to post notice of a
16 lawsuit against the defendant in the defendant's premises.

17 MS. MIRER: Only that I know that it's been done in
18 other cases where we believed that it was -- there was a need
19 to communicate to the people that they were -- that this was
20 not viewed as something that they should be afraid of.

21 THE COURT: Well, that's a different question of
22 whether it should be posted in the defendant's location.

23 MS. MIRER: Well, I mean, one of the concerns that we
24 have, obviously, is that there's fear on the part of current
25 employees and some of the current employees know where former

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1 employees are. And the problem is that if, given this
2 population finding people who may no longer work there, but,
3 maybe the only way to find them is through a posting of the
4 notice at the work place.

5 THE COURT: I don't understand that. Because if it's,
6 if your theory is that a current employee will tell his buddy,
7 a former employee, the current employee is going to get notice,
8 whether it's posted at the work place or gets it via mail or
9 e-mail. So what does posting the notice at the restaurant add
10 to that? I'm all in favor of trying to figure out ways of
11 getting notice to all of the affected class. I'm just not sure
12 how requiring the defendant to post it in the restaurant
13 advances that cause.

14 MS. MIRER: Well, your Honor, as I have said in the
15 past, we have had situations where that has been allowed
16 because there's been a concern that the employees, if it's not
17 posted in the defendant's premises, might feel somehow afraid
18 to respond.

19 THE COURT: Okay. Well, I'm not -- I hear you. I'm
20 not -- I don't think I buy that. At least based on the
21 employees I heard from, I didn't see a whole lot of fear and
22 quaking on their parts.

23 MS. MIRER: I agree with you, not in those employees.
24 Sure.

25 THE COURT: Okay, all right.

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1 Mr. Restituyo, we're not dealing with the motion to
2 dismiss here. We're dealing with the motion for collective
3 certification which, as we all know, is a very low threshold.
4 I look at these affidavits and I see a bunch of people who work
5 at both restaurants. They seem to allege common practices
6 between the two restaurants. We are talking a small, you know,
7 sort of, even as we heard during the RICO hearing, Mr. Liberato
8 owned both restaurants. He's back and forth. They seem to be
9 two restaurants of a common enterprise. So what is the
10 evidence that have different wage policies?

11 MR. RESTITUYO: So, your Honor, yes, my client owns
12 two restaurants and actually they're owned by two separate
13 corporations, but let's begin with the evidence here.

14 So to be clear, there are five affidavits submitted by
15 Ms. Mirer, not six.

16 Next, only one employee who is a Burnside employee
17 solely and that individual Mr. Salerno, you know, hasn't been
18 there since at least 2010.

19 As regards to the other affidavits that she submitted
20 regarding employees that actually did time in both places --

21 THE COURT: Right.

22 MR. RESTITUYO: -- right, those are the allegations,
23 the reality that they got paid at 183rd. In other words, their
24 home base was the 183rd location. And other than hearsay
25 statements to say, hey, the wage waitresses over there got paid

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1 the same or the chefs over there worked the same way, I could
2 say that about any local diner, there is a waitress at the
3 local diner that gets paid hourly and makes tips. That, in and
4 of itself, isn't enough to declare there is a common policy as
5 between the two restaurants. Certainly there is no evidence
6 here that's not, you know, hearsay evidence.

7 THE COURT: Were there different policies?

8 MR. RESTITUYO: Your Honor, to be frank --

9 THE COURT: You don't know?

10 MR. RESTITUYO: I don't no, exactly. I mean, the
11 record doesn't indicate it and I don't know.

12 THE COURT: Okay.

13 MS. MIRER: It's certainly a conditional
14 certification.

15 THE COURT: Well, that's exactly what I was just about
16 to -- I mean, if there is not, you can always move to
17 decertify. And it's not like this is final.

18 Anything else you want to say about whether or not
19 it's going to be certified?

20 MR. RESTITUYO: No, your Honor. Then my next points
21 have to do with notice.

22 THE COURT: The notice, go ahead.

23 MR. RESTITUYO: Your Honor, I think we have three
24 points with regard to notice, which I think we're kind of fair.
25 One may surprise you right now.

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1 So the first is that, you know, we allege that notice
2 has to be neutral and unbiased. And that's the --

3 THE COURT: Let me -- you can hold your breath on
4 this. The current notice is inadequate. I'm not going to
5 approve it.

6 MR. RESTITUYO: Fair enough. To that end, we were
7 going to suggest that the notice is probably premature, given
8 that there is no decision on the non-Liberato defendants, but I
9 presume that, to the extent your Honor decides on that, that
10 will be fine.

11 To address your points with regard to three years.
12 I'm not sure that there's been any indication that there was,
13 you know, willful conduct by the client. So I don't know why
14 we would expand the notice to three years versus two years. I
15 haven't seen a showing other than, you know, mere conclusory
16 allegation that there was willful conduct. I haven't seen a
17 showing why a notice would expand three years. And I know your
18 Honor was throwing that number out there.

19 THE COURT: Well, I was, largely because I don't know
20 whether we'll get to the point where the Court can say as a
21 matter of law any violation was not willful. But I would
22 rather have those workers in the pool and be subject to a
23 motion saying they're out because they're time barred because
24 in fact there was not a willful violation, and they were
25 employees more than two years prior, than have it be the other

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1 way around, that you've got employees who got legitimate
2 claims, and because the violation was willful, but they were
3 not included within the collective -- again, this is only --
4 this is step one -- if in fact there is no evidence of
5 wilfulness, then you cannot -- if there are employees in that
6 class, that is, who would be timely -- who are not timely for a
7 two year Statute of Limitations but timely for three, then you
8 have a motion for summary judgment against them.

9 MR. RESTITUYO: And we understand that, your Honor.
10 And, you know, I'm not really going to push too hard on this,
11 but it must be alleged, and I'm not sure that it was adequately
12 alleged at least. So other than that --

13 THE COURT: I think there's probably -- I think the
14 complaint is adequate to allege wilfulness.

15 MR. RESTITUYO: All right. Fair enough.

16 Lastly, your Honor, as regards the notice. And this
17 should not come as much of a surprise given some of the
18 testimony in regard to the -- that we heard in the RICO action,
19 is that we would ask that your Honor stay the distribution of
20 the notice pending on defendants' motion to disqualify Ms.
21 Mirer as counsel, for a number of reasons.

22 One, I think it's more -- there is more than enough
23 evidence to suggest that all plaintiffs in the Ramirez action
24 are Laundry Worker Center. There is some question as to what
25 Ms. Mirer's relationship is with regard to Laundry Worker

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1 Center. She, in fact, provided testimony to the Court
2 suggesting that she, on a previous occasion, actually got them
3 involved in one of her litigations. So certainly we think that
4 we would hate for the notice process to be a recruitment effort
5 for Laundry Worker Center, which I'm not sure whether it will
6 or will not be, there is a particular taint.

7 Our motion to disqualify will go into depth as to the
8 conflicting interest between Laundry Worker Center and the
9 potential class members, which are not necessarily one and the
10 same. Surely they have similar interests at time, but other
11 times they will not. And there is going to be the issue of
12 whether at some point Ms. Mirer may become a witness to
13 either -- certainly probably in the RICO action, and there is a
14 chance that she may become a witness in the FLSA action.

15 THE COURT: How could she be a witness in the FLSA
16 action?

17 MR. RESTITUYO: Well, your Honor, to the extent that
18 Laundry -- so defendants have counterclaims, answers to
19 counterclaims, and the counterclaims allege, you know, certain
20 defenses based on these plaintiffs' conduct with regard to how
21 they conducted themselves at work certainly as regards to the
22 retaliation claims. I'll give you an example, you know, with
23 regard to the retaliation claims, right. Though, though
24 defendants have one position as to whether there was
25 retaliation or not, plaintiffs certainly have another.

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1 Plaintiffs proceeded via other mechanisms for -- in addition to
2 filing here, other mechanisms for filing their retaliation
3 claims. To the extent that Ms. Mirer is Laundry Worker Center
4 and was sort of behind the scenes orchestrating that, there is
5 a possibility that she may be called as a witness.

6 Now I'm not suggesting that that's a certainty. Our
7 motion, to be frank, is a good two-thirds of the way through
8 and we're pulling up case law and we should be prepared to file
9 it by the weekend, but we think there is a possibility. And
10 all we're asking is that the Court stay, you know, the
11 notice -- we grant that there's going to be this conditional
12 class certification pending a resolution on that.

13 THE COURT: Ms. Mirer.

14 MS. MIRER: I think such a motion would be baseless
15 and would be -- I represent these plaintiffs in a FLSA action.
16 Whether we have a motion to dismiss the RICO claims, we don't
17 think there is any basis in law for them. And we're going to
18 be filing a motion to dismiss all of their counterclaims. If
19 they're trying to make a -- if they're trying to allege or push
20 the cases of the Laundry Workers Center and a couple of
21 individual workers together in a counterclaim to try to see
22 that there's somehow the fact that I might, under certain
23 circumstances, represent both, there is no conflict. I'm
24 representing people with respect to the issue of whether or not
25 they are being unfairly paid, and that's it.

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1 THE COURT: Help me -- I can't see -- I can see the
2 Laundry Workers Center Which may have broader goals relative to
3 worker fairness and --

4 MR. RESTITUYO: Right.

5 THE COURT: -- and the like than an individual
6 plaintiff does. An individual plaintiff presumably, or most of
7 the class, maybe not all of them, some of them may have signed
8 on and believe in broader goals and using this case for broader
9 goals, but my guess is that the class as a whole, their
10 motivation is monetary. So where is the conflict?

11 MR. RESTITUYO: So --

12 THE COURT: Where is the conflict that is different
13 from any time you have a lawyer, and there are a bunch of them,
14 who represent unions and they represent individual employees.

15 MR. RESTITUYO: Right.

16 THE COURT: And that is not a conflict.

17 MR. RESTITUYO: Fair enough. So, your Honor, I'm
18 going to briefly just -- it just so happens in this case all
19 the plaintiffs in the Ramirez action are Laundry Worker Center,
20 right, but --

21 THE COURT: But let me just interrupt you for a
22 second.

23 MR. RESTITUYO: Yeah.

24 THE COURT: I find this sort of interesting. Let's
25 suppose -- forget Laundry Center Workers. Suppose they were

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1 all members of the ACLU.

2 MR. RESTITUYO: Right, so --

3 THE COURT: So what?

4 MR. RESTITUYO: So here -- so wait. And I'm saying --
5 I apologize.

6 THE COURT: Okay.

7 MR. RESTITUYO: The majority of those plaintiffs
8 actually happen to be ex-employees. And that's important that
9 the majority of ex-employees and that the few current employees
10 are actually, you know, listed as on Laundry Worker Center's
11 website as sort of, you know, volunteer organizers. And they
12 may have guarantees that the other employee class members do
13 not have.

14 Why is that important? Because Laundry Worker Center
15 may not care whether Mr. Liberato goes out of business, but the
16 employees may very well be concerned for their future
17 wellbeing. Laundry worker center may want to set an example of
18 Liberato, for whatever reason. The employees may simply want
19 to ensure there livelihood and get their money and go on their
20 way, right.

21 For laundry workers, this is part of an overall
22 campaign. This is one in however many other campaigns they're
23 going to have. For the class, for the majority of the class,
24 certainly the employees that are in there, this is going to be
25 personally quite, you know, intimate to their livelihood.

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1 This is -- you know, there are going to be as regards
2 the union context, right, Laundry Worker Center may be
3 interested in creating a union that may not necessarily be part
4 of what the other employees want. Laundry worker center may be
5 interested in having under union guidelines certain laws
6 followed to the letter of the law, and there may be certain
7 other employees. And we all know they exist, undocumented,
8 unwilling to pay taxes, et cetera, that may not have the same
9 interest.

10 So at least on those fronts there are interests which
11 do not necessarily align. Certainly everybody wants to get
12 paid, and we understand that. But when you get down to the
13 nitty-gritty of things, not everybody is in the same position,
14 right. So if there is a current employee at Liberato that's a
15 Laundry Worker's member center that's told don't worry if they
16 go bust we got you another job, her 40 other employees that are
17 working there don't have that freedom. And so they may not
18 necessarily be seeing eye to eye when it comes down to --

19 MS. MIRER: This is --

20 MR. RESTITUYO: -- pursuing the case.

21 MS. MIRER: -- such fantasy.

22 THE COURT: That's not -- my issue, accepting
23 everything you say, is that's not a legal conflict of interest.
24 That's a problem of there may well be different interests
25 within the class.

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1 MR. RESTITUYO: Okay.

2 THE COURT: That's always true. You can always have
3 situations where some employees are looking for a big pay off,
4 other employees are satisfied with take a reasonable pay off
5 and let's get going. That's --

6 MR. KRASELNIK: And they're always former and current
7 employees anyway.

8 THE COURT: As part of the class.

9 MR. RESTITUYO: You've asked me to outline the class
10 differences, right.

11 THE COURT: Okay.

12 MR. RESTITUYO: We can go -- so now as regards the
13 Laundry Workers Center differences. So to the extent that
14 like -- and thank God Mr. Kraselnik spoke up -- this may not be
15 an issue if Mr. Kraselnik was sending out the notice. Because
16 certainly there is no link between him and Laundry Worker
17 Center. And there is no indication, at least as far as I know,
18 that the process will be tainted in a way that this will be a
19 sort of a campaign by Laundry Worker Center to gather more
20 members.

21 THE COURT: Okay. Well, this probably isn't going to
22 satisfy all of your concerns, but there will be an order that
23 says any data that's provided relative to these employees, may
24 be -- employees and former employees, may only be used for this
25 litigation. They may not be shared with anyone else, including

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1 Laundry Workers group or whatever, the Laundry Workers, that's
2 what this is all about. So, you know, I'm not going to stop
3 you from making your motion, but it's not being readily
4 apparent to me that you've got a winning motion to disqualify.

5 MR. RESTITUYO: Fair enough.

6 But, your Honor, to say that, you know, this -- all
7 information may be gathered, that will be gathered will not be
8 shared with Laundry Worker Center -- if at some point it's
9 determined that Ms. Mirer was Laundry Worker Center, then what?

10 MS. MIRER: Your Honor, I don't understand what I was
11 Laundry Worker Center means. I mean, I am an attorney. I
12 represent clients. I represent clients to the best of my
13 ability. I fight for my clients. Whether they're
14 organizations or individuals, I do not allow conflicts of
15 interest to get in the way.

16 MR. RESTITUYO: Your Honor, Ms. Mirer uses Mr. Aran,
17 the chair, the founder of Laundry Worker Center as her
18 translator, one.

19 She said on the record this -- this was -- there's
20 transcript to this effect; that in the dishes action she was
21 involved and she brought in Laundry Worker Center to get
22 involved in that campaign to help her resolve the matter
23 presumably. So certainly --

24 MS. MIRER: Your Honor --

25 THE COURT: I don't think that means that she is

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1 laundry workers. Attorneys can bring in a third party mediator
2 at any time. Look --

3 MR. RESTITUYO: Okay.

4 THE COURT: -- I understand your frustration with this
5 situation. I truly do. You know, I'm only doing what I can
6 do. And what I can do is what I've told you guys I'm going to
7 do, which is I'm going to lance the boil. And what we're going
8 to do is we're going to go as fast as possible to get to trial,
9 because that will give your client the peace he wants, it'll
10 give the plaintiffs the opportunity to demonstrate that they
11 are being abused and mistreated by their employer and, if so,
12 they will get a judgment. And, as you know, the more of this
13 litigation that you all are engaged in, her little ticker just
14 keeps going. And if they prevail, your client is paying her
15 fees. You know that.

16 So, again, make your motion. I'm happy to review it,
17 but I'm not going to stop anything for that. Because based on
18 what I'm hearing, I'm not convinced that that is a winning
19 strategy at the moment.

20 Anything else you want to tell me relative to the
21 notice on collective certification?

22 MS. MIRER: Your Honor, I think they've indicated that
23 they want something in the notice about LWC and fees, I mean
24 the LWC is not entitled to fees in this case.

25 THE COURT: LW --

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1 MS. MIRER: Not fees, but to the Laundry Worker Center
2 was what?

3 MR. RESTITUYO: We asked they be excluded from the
4 process.

5 THE COURT: They're not going to be involved in the
6 process.

7 MR. RESTITUYO: Right. So I think that was the
8 affirmative. We also asked --

9 THE COURT: But that doesn't mean the notice should
10 discuss them.

11 MR. RESTITUYO: No, no, no no. We ask -- I don't
12 recall --

13 THE COURT: Here's what we're going to do. I'm going
14 to give you my thoughts on the notice.

15 You're going to be directed to meet and confer and try
16 again on a new notice that satisfies the directions that I'm
17 giving you.

18 What I want to do right now -- is there anything else
19 specifically, though, that you want to make sure that I think
20 about relative to the notice?

21 MR. RODRIGUEZ: Yes. I want to make one more point,
22 your Honor. I guess the main concern we have is that we don't
23 want Laundry Worker Center to undermine the Court's supervisory
24 role on the dissemination of the notice.

25 So in the RICO case there was plenty of testimony to

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1 the effect that these guys use heavy-hand tactics; they'll go
2 to people's apartments and they just use aggressive tactics in
3 order to bring people aboard, and that they actually, you know,
4 disseminate the defamatory statements that are false, and
5 basically that they're going to undermine the Court's
6 supervisory process.

7 THE COURT: Okay. So, again, my order is going to be
8 that this data cannot be shared with anyone else. I have
9 confidence that Ms. Mirer is going to comply with that. So the
10 laundry worker is not going to have this information. They're
11 going to -- the data will be held, the contact information is
12 going to be held by Ms. Mirer. It's going to be limited, to
13 the extent the defendants have it, a mailing address, and an
14 e-mail address. No other information; telephone number is not
15 going to be disclosed, social security number is not going to
16 be closed, assuming that they have it, that is not to be
17 disclosed.

18 So anything further you think I should know before I
19 take a five minute break?

20 MS. MIRER: No, your Honor.

21 THE COURT: Relative to the notice? Okay. Five
22 minutes. Don't go far.

23 (Recess)

24 (After the recess)

25 THE DEPUTY CLERK: All rise.

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1 THE COURT: Be seated. Okay, thank you.

2 In light of your submissions and what I've heard
3 today, I'm prepared to render an oral decision on both of the
4 motions now before me.

5 For reasons that I will explain, the non-Liberato
6 defendants motion to dismiss the complaint is granted and
7 plaintiffs' motion for conditional certification is granted,
8 insofar as it seeks authorization to send a notice to the
9 putative group, but the proposed notice is rejected as
10 insufficient. As I discuss more below, I'll ask the parties to
11 submit a revised proposed notice no later than next Wednesday,
12 March 18. I'm also prepared to dismiss the tenth, eleventh,
13 twelfth, and thirteenth causes of action for lack of subject
14 matter jurisdiction, although I will permit plaintiffs to brief
15 that question before I do.

16 Under FLSA, the definition of employer relies on the
17 very word it seeks to define: "Employer includes any person
18 acting directly or indirectly in the interest of an employer in
19 relation to an employee." From Irizarry versus Catsimatidis,
20 722 F.3d, 99, 103, Second Circuit, 2013, quoting 29 U.S.C.
21 203(d). The Second Circuit has rejected a formalist approach
22 to determining who can be sued as an employer. Instead, it has
23 established a four factor test to determine the economic
24 reality of the relationship. The questions are whether the
25 alleged employer, one, had the power to hire and fire

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1 employees, two, supervised and controlled employee work
2 schedules or conditions of employment, three, determined the
3 rate and method of pay and, four, maintained employment
4 records. It's from Irizarry 722 F.3d, at 104-05. This is the
5 so-called Carter test.

6 When determining whether an individual within a
7 company is personally liable for damages as an employer, courts
8 apply the four-factor test articulated in Carter and consider
9 other factors bearing on the overarching question of whether
10 the alleged employer possessed the power to control the workers
11 in question.

12 Although it's a open question, both parties have
13 assumed, as will I for the purposes of this motion, that the
14 question of employer liability under the New York Labor Law is
15 the same as under FLSA.

16 For the purposes of deciding the motion to dismiss, I
17 have considered information contained in the affidavits
18 submitted in support of the conditional certification as a
19 collective action and the affidavits submitted in support of
20 plaintiffs' motion for preliminary injunction dated October 9,
21 2014, and the affidavit and attachment that was handed up to
22 the Court today. Defendants correctly point out that such
23 materials are generally not considered when evaluating the
24 sufficiency of pleadings. There is no language in the third
25 amended complaint that incorporates by reference the

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1 plaintiffs' affidavits in support of conditional certification
2 or in support of their motion for preliminary injunction, and
3 the affidavits were certainly not attached to the complaint as
4 exhibits. Thus, the Court could properly ignore all such
5 factual allegations when deciding defendants' motion to
6 dismiss. Even considering all of those materials, however, the
7 plaintiffs have not adequately alleged the non-Liberato
8 defendants are employers within the meaning of FLSA.

9 First, allegations against Romeo, last name unknown,
10 and Fernando Liberato appear only in paragraphs 19 and 24, both
11 conclusory allegations. Plaintiffs do not discuss these
12 defendants in their opposition brief at all. Even assuming
13 that the claim against them was not abandoned because
14 plaintiffs failed to address them when opposing defendants'
15 motion, plaintiffs have not alleged anything close to employer
16 status as defined in Irizarry. I'll get to the allegations
17 against Fernando Liberato, also known as Raphael, that were in
18 the most recent affidavit in a little bit. Nonetheless, I can
19 tell you not to give up. What's going to happen, the case
20 against Romeo, last name unknown and Fernando Liberato will be
21 dismissed.

22 Second, in paragraph 18 of the complaint, plaintiffs
23 allege that Victor Liberato is an employer under FLSA because
24 he was a "supervisor/manager." Omar Taveras asserted in his
25 affidavit in support of the collective action certification at

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1 paragraph 17 that Victor Liberato told him that if he did not
2 sign a false payroll record, he would be fired. The Taveras
3 affidavit barely touches on two of the Carter factors. It
4 somewhat supports the allegation, which plaintiff never
5 actually articulated, that Victor Liberato maintains employment
6 records, and it may be related to whether he had the power to
7 hire and fire employees. The problem is that it does not go so
8 far as to indicate that Victor Liberato himself would fire him,
9 and it reads more like Victor was predicting what the boss,
10 presumably Manuel Liberato, would do. But more important,
11 there is no allegation that even remotely suggests that Victor
12 Liberato had the authority to supervise or change employee work
13 schedules or to determine the employees' rate of pay. I've
14 reviewed the affidavits submitted today. Allegations in that
15 that an employee told Victor she would be out one day because
16 she was ill simply does not equal an allegation that Victor is
17 an employer. I think all of us in our experience have had
18 circumstances where an employee notifies another employee that
19 they will be out. That does not make that second employee an
20 employer for purposes of FLSA. The Circuit has indicated that
21 after the economic factors, courts must look to the totality of
22 the circumstances to determine whether a defendant had
23 "functional control." Unlike the president of the hotel held
24 liable in Moon v. Kwon the case relied on by plaintiffs, there
25 is nothing in the complaint or any other affidavits I have

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1 considered from which I could infer that Victor Liberato
2 exercised "operational control" over the employees at Liberato
3 Restaurant the. Accordingly, he too is dismissed from the
4 complaint.

5 Next, Nelson Gomez. Paragraph 20 of the third amended
6 complaint contains conclusory allegations that he is a manager.
7 Certain of the plaintiffs' affidavits in support of conditional
8 certification also mention him as a manager. Luis Espinal, for
9 example, alleges in paragraph 14 of his affidavit in support of
10 conditional certification that he once heard Nelson Gomez tell
11 other workers that "they must not ask about what" the book
12 containing their time sheets says. Javier Guerrero's affidavit
13 in support of plaintiffs' motion for preliminary injunction
14 asserts that Nelson Gomez told him that his hours would be
15 reduced. Finally, defendants in their RICO action allege that
16 Gomez is a manager. But none of this goes to anything other
17 than him having the title of manager. Plaintiffs have not
18 alleged that Nelson Gomez set their pay or hours, maintained
19 employment records, or hired or fired employees. Put
20 differently, putting everything together, there is no
21 suggestion that Nelson Gomez is an employer under the FLSA's
22 definition. Accordingly, the FLSA and New York Labor Law
23 claims are dismissed against Nelson Gomez.

24 I'll come back to the sexual harassment claims.

25 As to Lucila Gomez, plaintiffs again rely on vague

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1 allegations that she told plaintiffs to sign a book to receive
2 their pay. See, for example, the Oscar Ramirez affidavit in
3 support of collective certification, paragraph 11. The
4 complaint at paragraph 32 also specifically mentions that Lucy
5 Gomez made the defendant sign a document in order to be paid.
6 But assuming the truth of all of the things that plaintiffs are
7 alleging, which I must do at this stage of the litigation,
8 that, at most, might establish one of the Carter factors that
9 Lucila Gomez in some sense maintained employee records. But
10 there is no allegation that she had the power to set wages,
11 hire or fire, or determine employees schedules, nor are there
12 any allegations that demonstrate any operational control over
13 Liberato's employees. Accordingly, the case will be dismissed
14 against Lucila Gomez.

15 As to both Lucy Gomez and Fernando Liberato, also
16 known as Raphael Liberato, I do not find the tape that was
17 attached to the affidavit that was handed up today, even
18 assuming that it is an accurate translation -- which there
19 would be some question about -- shows that Lucy Gomez or
20 Fernando Liberato were employers. The tape seems to suggest
21 they were explaining their understanding of the employer's
22 policy, but that alone does not make them an employer.

23 As to Sarah Vallejo, plaintiffs rely on vague
24 allegations that she told employees that if they did not like
25 their pay, they were free to leave. See, for example, the

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1 Guillermo Alvarez affidavit in support of conditional
2 certification at paragraph four. Moreover, defendants describe
3 her as a "shift manager at Liberato Restaurant" in paragraph 93
4 of their RICO action. But nowhere is there any allegation that
5 she has the power to set hours or wages, hire or fire, or
6 maintain employment records. There are no allegations tending
7 to show that she has any operational control over Liberato's
8 employees; accordingly, the case is dismissed against Sarah
9 Vallejo.

10 Finally, Sixta Rosaura Gomez, sued as Nana, was
11 allegedly implicated in plaintiffs' affidavits in support of
12 their motion for preliminary injunction. The plaintiffs allege
13 in those papers that she was "involved in" the decision to
14 reduce the hours of some employees. This allegation goes to
15 only one of the Carter economic reality factors. There is no
16 allegation that Ms. Rosaura Gomez could hire or fire employees,
17 maintain employment records, or determine rates of pay.
18 Moreover, although paragraph 23 of the complaint alleges in a
19 conclusory way that Ms. Rosaura Gomez had "supervisory control"
20 over the plaintiffs, this is exactly the kind of threadbare
21 recital of the elements of a cause of action that does not
22 suffice to plead her status as an employer under FLSA.

23 Accordingly, plaintiffs' FLSA and New York Labor Law
24 actions are dismissed with prejudice as against Fernando
25 Liberato, also known as Raphael, Victor Liberato, Nelson Gomez,

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1 Lucy Gomez, Sarah Vallejo, Nana, and Romeo last name unknown.
2 The third amended complaint remains against M.S. Restaurant
3 Corp., M.L. San Jose Enterprises corp., and Manuel Liberato.

4 I want to say a few words about plaintiffs' claims
5 under the New York City and New York State Human Rights Law for
6 unlawful discrimination based on pregnancy and unlawful sexual
7 harassment. That's the tenth through thirteenth causes of
8 action in the third amended complaint. "Failure of subject
9 matter jurisdiction is not waiveable and may be raised at any
10 time by a party or by the Court sua sponte. If subject matter
11 jurisdiction is lacking, the action must be dismissed."
12 That's Lyndonville Savings Bank & Trust versus Lussier, 211
13 F.3d, 697, 700-01, Second Circuit 2000. Because complete
14 diversity is lacking in this matter, the parties may pursue
15 their state law claims in federal court only if those claims
16 fall within the Court's supplemental jurisdiction. The
17 permissible scope of the Court's supplemental jurisdiction is
18 set out in 28 U.S.C. Section 1367(a).

19 The Second Circuit continues to rely on the language
20 from Gibbs requiring that state claims share a "common nucleus
21 of operative fact" with federal claims before a federal court
22 can exercise subject matter jurisdiction of those claims. Even
23 courts that have adopted the more permissive "loose factual
24 connection" standard hold the mere fact that claims arise from
25 a single employment relationship is not, by itself, sufficient

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1 to warrant the exercise of supplemental jurisdiction. I refer
2 you to Berg v. BCS Financial corp. 372 F. Supp. 2d, 1080, 1093,
3 Northern District of Illinois 2005.

4 The claims that certain plaintiffs were sexually
5 harassed and were wrongfully discharged due to pregnancy may
6 state a cause of action, but they are expressly alleged as
7 state law causes of action. These claims are entirely separate
8 from the federal FLSA claims that give this Court subject
9 matter jurisdiction. Plaintiffs are, therefore, ordered to
10 show cause no later than March 23, 2015 why this Court should
11 not dismiss the tenth, eleventh, twelfth and thirteenth causes
12 of action for lack of subject matter jurisdiction. Defendants
13 may be, but not need not respond. Any response is due
14 March 27th 2015.

15 Turning now to the motion for conditional
16 certification. As you know, this motion focuses on step one of
17 a two-step method for determining the appropriateness of FLSA
18 certification that was approved by the Second Circuit in Myers
19 versus Hertz, 624 F.3d, 537 at 554-55, Second Circuit 2010. At
20 this stage plaintiffs must make only a modest factual showing
21 that they and potential opt-in plaintiffs were victims of an
22 unlawful common policy or plan. Plaintiffs' burden at this
23 stage is not non-existent, but it is quite modest.

24 In this case, plaintiffs' 12 affidavit have more than
25 met this low bar. Each affiant has alleged that defendants'

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1 policies and practices violated FLSA. Although the affidavits
2 differ slightly, I credit them at this stage. For example,
3 Juana Cruz Hernandez asserts that neither she nor her
4 co-workers ever received a record of any tips received, that
5 neither she nor her co-workers received overtime for hours
6 worked in excess of 40 per week, and that she believed that her
7 co-workers were subjected generally to the same treatment that
8 she was. The other affidavits are largely consistent. The
9 fact that 12 affiants were subject to similar policies is
10 itself evidence that any violation is likely the result of a
11 broadly-applicable policy.

12 For these purposes and at this stage of the
13 litigation, I do not credit the defendants' arguments that the
14 Burnside location is distinct from the 183rd Street location.
15 First, the affidavits describe Liberato Restaurant as one
16 establishment with two locations. This suggests that a policy
17 in place at one location would also apply to the other
18 location. Second, several of the employees, specifically
19 Geronimo Herculano, Mirna Reyes Martinez and Omar Taveras
20 worked at both locations and appear to describe uniform
21 policies in both restaurants. Collectively, the affidavits
22 make the required modest showing that the policies in place at
23 Burnside were applicable to all non-managerial employees and
24 are more than sufficient to meet the threshold for the
25 conditional certification at this stage.

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1 Defendants will have the opportunity to move to
2 de-certify the collective after the close of discovery, as
3 described in Myers. But for now, plaintiffs have made the
4 modest showing that the first stage requires.

5 As to the method and content of the proposed Notice
6 and Consent, it is the Court's responsibility to "monitor
7 preparation and distribution of the notice to ensure that it is
8 timely, accurate and informative." See Jian Guo, that's 2014
9 Westlaw, 5314822 at page 4 quoting Hoffman-La Roche versus
10 Sperling, 493 U.S. 165, 172. Because I have a large number of
11 concerns about the notice as it currently stands, I'm directing
12 the parties to meet and confer about the notice and to submit a
13 revised version of the notice, consent and order not later than
14 March 18. Ms. Mirer, I note that many of the flaws with the
15 notice were identified by the defendant in his opposition, but
16 you did not respond to those identified issues.

17 First, I have a number of procedural issues. Because
18 I understand that waiters, busboys and other low-level
19 restaurant workers may move with some frequency, I think the
20 use of e-mail, in addition to the U.S. mail, which may not be
21 forwarded to the intended recipient, is appropriate. I do not
22 see any reason for phone numbers, Social Security numbers or
23 dates of employment to be discoverable, however. I will order
24 that any information provided to plaintiffs' attorney for the
25 purpose of this mailing, including the names and addresses of

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1 former employees, is to be used solely for purposes of this
2 litigation and is not to be shared with anyone for any purpose.
3 That specifically includes the Laundry Workers Center and its
4 various officials. I will not order the defendants to post the
5 notice inside the restaurants, nor will I enjoin any labor
6 organization from raising awareness about the action. But I do
7 caution you, Ms. Mirer, that I recognize the connection between
8 you and various labor organizations, and I will not hesitate to
9 take appropriate action if any organizations promulgate false
10 or misleading information regarding this lawsuit.

11 Second, the parties dispute the proper date to include
12 on the notice. Plaintiffs have made no showing that the class
13 should be defined as people who are employees since June 4,
14 2011; that is, there should be equitable tolling in the interim
15 nine months. Because I'm not prepared to make a willfulness
16 finding at this date, I will permit the notice to reach back
17 three years from the date of the notice, not from the date of
18 filing of the complaint, with the understanding that challenges
19 to the timeliness of individual plaintiffs' actions can be
20 raised at a later date.

21 Finally, I'm inclined to agree with the defendants
22 that a 45-day period for opting in should be sufficient,
23 although I was playing with moving it back to 30, but I'm going
24 to leave it at 45. As I've told the parties on numerous
25 occasions, the best way to deal with this case, to get the

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1 workers the money they are owed, if any, and to get
2 Mr. Liberato the peace that he desires, is to make sure that we
3 get to a just resolution of this lawsuit quickly. By now the
4 workers at both restaurants are doubtless already aware of the
5 dispute, and there is no reason to give them three months to
6 decide whether or not to opt in.

7 As to the substance of the notice, I also have a
8 number of serious concerns. That's why I'm ordering the
9 parties to meet and to work on a new jointly-proposed notice to
10 be submitted no later than March 18th. If the parties cannot
11 agree on the joint notice, they should agree on as much as
12 possible and then point out the specific areas of disagreement
13 with plaintiffs' proposed language and defendants' proposed
14 language included so there will be one document with
15 plaintiffs' proposal and defendants' proposal. All of that is
16 to be submitted on March 18th. I am confident that you should
17 be able to agree. The fact is that a notice is going to go out
18 one way or the other, so it does nobody any good to fight over
19 what I call "happy to glad" differences in wording. I do have
20 some guidance for the parties on what I expect to see in the
21 new notice.

22 At the outset, the notice should not look like an
23 order from the Court. I refer the parties to docket number 14
24 CV 2926, another FLSA collective action that contains a Notice
25 of Lawsuit that I approved. That notice is a good "go by" for

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1 what a notice should look like, at least in this courtroom.

2 The notice should state in plain English that the
3 Court has not determined that Liberato Restaurant has done
4 anything wrong. This statement need not be bolded an all caps,
5 as proposed by defendants, but it needs to be on the front page
6 in clearer language than it was in the proposed notice.
7 Similarly, the phrase court-ordered notice should be replaced
8 by Court-authorized notice.

9 Second, the defendant should be able to have a full
10 paragraph explaining their position. The plaintiffs' proposed
11 one sentence is insufficient. I do not accept, however
12 defendants' position that the notice should include a
13 discussion of the RICO action. That would not be appropriate,
14 as it does not relate to the merits of the FLSA case.

15 Third, the notice should clearly explain what might be
16 required of prospective participants in the lawsuit, including
17 their potential discovery obligations.

18 Fourth, the notice is patently improper with respect
19 to attorneys. Ms. Mirer, you can not assume that all
20 prospective opt-in plaintiffs will choose to be represented by
21 you. You must make it clear that Mr. Kraselnik is playing a
22 role in the representation, and more importantly, that
23 potential plaintiffs may elect to hire their own attorneys.
24 The notice should also provide contact information for
25 defendants' attorneys if they wish to be listed on the form.

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1 It is unreasonable to require the notice to include a
2 specific percentage of any recovery that will be paid as
3 attorneys fees, particularly because any award of fees will
4 likely be subject to this Court's approval. I also side with
5 the majority of the courts in this district that permit opt-in
6 plaintiffs to mail the consent forms to plaintiffs' counsel.
7 Because I have directed that the notice should contain language
8 specifically notifying opt-in plaintiffs of their right to
9 obtain their choice of counsel, there is less of a concern
10 about improperly endorsing plaintiffs' counsel.

11 Finally, as defendants indicated, there should be a
12 clear statement that putative opt-in plaintiffs should not
13 contact the Court with questions regarding the lawsuit.

14 I look forward to receiving the parties' submissions
15 next week. While I will not be publishing an order listing the
16 specific recommendations that I just detailed, if the parties
17 have a question prior to Wednesday, you are invited to jointly
18 call chambers and I promise to sort it out swiftly.

19 Let me stress, your submission should clearly show
20 what you agree on, and if there are provisions on which you can
21 not agree, you should both set out the language you propose.
22 Please note, this is going to be like a baseball arbitration.
23 I will pick one version or the other. I am not going to take
24 the time to rewrite one or the other of your submissions to
25 somehow split the baby. So be reasonable on what you are

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1 proposing. I think if you do that, you'll be able to reach
2 agreement.

3 I also concur that the notice should be sent out in
4 Spanish. You need to concur as well, once we have an agreed
5 upon English language. Ideally, if you can agree on one
6 translator to create Spanish language version, that seems to be
7 ideal.

8 So let's talk about the schedule going forward. How
9 long does the defendant need -- okay. How long is the
10 defendant going to need to produce the names and addresses to
11 the plaintiff?

12 MR. RESTITUYO: I'm going to say two weeks, your
13 Honor.

14 THE COURT: Can you do it by the 23rd? That's, from
15 today that's a little less than two weeks.

16 MR. RESTITUYO: I have to ask my client, but sure.

17 THE COURT: Well, I'm inclined to order that. And if
18 it really can't be done, which I'm skeptical that it can't,
19 this is not a huge restaurant. You've known this is coming.
20 So, if it just can't be done -- if it can't be done, it can't
21 be done, but that's kind of where I'm leaning to. From the
22 time that the names and address are provided, how long is it
23 going to take plaintiff to get the notices out?

24 MS. MIRER: It can be a very quick turnaround time
25 from my office. It shouldn't take more than a week.

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1 THE COURT: I was thinking of giving you a little bit
2 less than that. The 23rd is a Monday. I'm proposing the 27th,
3 which would be Friday.

4 MS. MIRER: That's fine.

5 THE COURT: Okay. Talk to me about discovery. What
6 discovery does the plaintiff anticipate taking?

7 MS. MIRER: Your Honor, when things were not stayed I
8 submitted to the defendant requests to admit interrogatories
9 and document requests, and the defendant took the position that
10 given everything being stayed, he didn't have to respond to
11 anything at that point. So we've already provided them and
12 have filed those discovery requests. And so --

13 THE COURT: Okay. Is that the extent of the discovery
14 you intend to take?

15 MS. MIRER: No, I mean obviously --

16 THE COURT: What other discovery?

17 MS. MIRER: I want to take the depositions of
18 Mr. Liberato, and at this point basically him as the owner.

19 THE COURT: Okay, all right. That seems like fairly
20 modest discovery.

21 How about the defendant, Mr. Restituyo, what discovery
22 do you anticipate taking?

23 MR. RESTITUYO: Your Honor, we would serve
24 interrogatories for sure. And since we doubt that they have
25 documents, we'll certainly take depositions of the plaintiffs.

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Motion

1 THE COURT: How many -- do you know, Ms. Mirer, how
2 many of the plaintiffs have some documents they were keeping
3 track in some way of their hours, days worked or paid?

4 MS. MIRER: I think most have some documents. We
5 asked each one of them to, just for our purposes, to develop
6 what they thought was the proper calendar. So we, for us to do
7 a --

8 THE COURT: To develop a calendar or was this a
9 preexisting calendar?

10 MS. MIRER: We gave them a calendar, and so we could
11 do our own internal calculations. That they filled out as to
12 how many hours they work and what the shifts were. That's our
13 work product.

14 THE COURT: Did any of them have
15 contemporaneously-created documents?

16 MS. MIRER: I think some of them, did, yeah. I think
17 some of them had their envelopes.

18 MR. KRASELNIK: We have pay envelopes that say the
19 amount of hours worked.

20 THE COURT: They kept.

21 MR. KRASELNIK: They kept. You know, the employer
22 wrote it, Simon Grullon, 72 hours, Simon Grullon, 66 hours --

23 THE COURT: So you're going to get some documents.

24 MR. RESTITUYO: So then I guess we'll be asking for
25 the documents.

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Motion

1 THE COURT: Okay, but --

2 MR. RESTITUYO: I'm not --we understand it's modest,
3 your Honor.

4 THE COURT: And I also assume that the depositions
5 you're talking a couple hours per employee per plaintiff, maybe
6 a little more than that? I'm just trying to get a sense of --

7 MR. RESTITUYO: Yeah.

8 THE COURT: -- when I set a discovery deadline, am I
9 going to be killing you or not. And it sounded to me like a
10 reasonable discovery -- I mean, none of this is going to take a
11 lot of time.

12 MR. RESTITUYO: Your Honor, in fairness, none of it
13 individually takes a lot of time, but you have set briefing on
14 a couple of questions that are pending, and they're concurrent
15 with, you know, the notice. And so --

16 THE COURT: I know. I'm bound and determined to get
17 you guys a trial.

18 MR. RESTITUYO: And we appreciate that, your Honor,
19 but I'm sure Ms. Mirer has other cases and we also have other
20 cases. And so sadly and unfortunately those can't be placed in
21 abeyance while this gets resolved.

22 THE COURT: All right. Do either parties anticipate
23 that you're going to need expert discovery from the plaintiffs'
24 perspective?

25 MS. MIRER: I don't think -- I mean I think to the

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Motion

1 extent that we may have somebody who does calculations for us,
2 other than what we've done just on the excel sheets, we may
3 have that. But --

4 THE COURT: Right, okay.

5 MS. MIRER: But, your Honor, the main problem that we
6 have is that we think there is a significant amount of evidence
7 that the records that we're going to receive are going to be
8 based on false -- are false, in the sense that people had to
9 sign false documents. And so there is going to be -- there may
10 be some issues that we have to raise with -- at least maybe
11 take some deposition of some of the other people even though
12 they're not defendants, so, yeah.

13 THE COURT: I ask you who --

14 MS. MIRER: Yeah. So I'm just thinking in terms of
15 all of these things that have come up with respect to doing
16 calculations and potential paucity of documents.

17 THE COURT: Okay. That still doesn't generate expert
18 discovery.

19 MS. MIRER: Yeah, I don't know that we would need it
20 except for maybe some --

21 THE COURT: Spread sheet person.

22 MS. MIRER: Spread sheet person, yeah.

23 THE COURT: How about you?

24 MR. RESTITUYO: We don't foresee expert discovery,
25 your Honor.

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Motion

1 THE COURT: Okay. Does either party anticipate filing
2 a motion for summary judgment? Ms. Mirer?

3 MS. MIRER: Depending on what the evidence is, yes.

4 THE COURT: Well, I assume he's not going to admit
5 that he falsified documents.

6 MS. MIRER: I think Victor Liberato sort of did
7 already.

8 THE COURT: Okay. I will set up a schedule that
9 includes motion for summary judgment. But I would ask you all
10 to think very hard about whether that is a useful expenditure
11 of time. And the reason is because I cannot imagine that you
12 are going to dispose of the entire case, and I can't imagine
13 that you're really going to narrow the issues that are going to
14 have to be tried with a motion for summary judgment. So what
15 that means then is that I'm going to move your what would
16 otherwise had been the discovery deadline back to give me time
17 to figure in a motion for summary judgment. So your discovery
18 deadline is going to be June 19th. That is a firm deadline.
19 You will have a status conference on June 19th. It'll be at
20 11:00 o'clock. I do my normal calendar at 10:00, so that will
21 essentially put you at the end of the normal calendar.

22 Your summary judgment motion will be due on June 26.
23 This is all going to go into an order, so you don't have to
24 take down these dates, but you'll get a sense of where I'm
25 going.

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Motion

1 So the summary judgment motions will be due June 26,
2 responses will be due July 2nd, replies will be due July 6th.
3 If you any motions in limine for the trial, they will be due
4 July 9. Responses to the motion in limine will be due
5 July 16th.

6 The joint pretrial order -- look at my individual
7 rules to see what that order is supposed to look like -- are
8 also due July 16th. And other things that are included in
9 there are requests to charge and proposed voir dire questions.

10 Final pretrial conference will be on July 23rd at 2:00
11 o'clock. Trial will begin July 27th at 9:30 with jury
12 selection.

13 Let me see. So just to reiterate. So the briefing on
14 the motion to dismiss for lack of subject matter jurisdiction
15 is due the 23rd, with a response, if any, due the 27th -- so,
16 Mr. Restituyo, you said you've got a motion to disqualify
17 that's going to be ready on Friday?

18 MR. RESTITUYO: Monday, your Honor, if we can -- I
19 mean yes.

20 THE COURT: Today is -- so on the 16th?

21 MR. RESTITUYO: Today is Thursday. Yes, your Honor.

22 THE COURT: Okay. So your deadline is 3/16 for your
23 motion to disqualify. Your deadline to respond to the motion
24 to disqualify is 3/27, and reply brief will be due on April 1.

25 All right, is there anything that I had forgotten?

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Motion

1 MS. MIRER: Only thing I would ask, your Honor, is
2 that because we filed discovery back in October I believe it
3 was, and there were requests to admit that were not even
4 responded to, whether or not those would be deemed admitted or
5 do I have to resubmit those?

6 THE COURT: I don't see any reason why you should have
7 to resubmit them, but you got to respond to the RFAs.

8 MR. RESTITUYO: Your Honor, sure. You just dismissed
9 against, you know, seven or eight defendants. I mean, it would
10 have been unfair to have --

11 THE COURT: I'm not deeming them admitted.

12 MR. RESTITUYO: Okay.

13 THE COURT: Here's what -- look, there is one thing I
14 despise more than anything else, and that is discovery
15 disputes. Work together. You know what each other wants, know
16 what each other needs. Go through your RFAs. You know what is
17 out now because those defendants are out.

18 You should think in terms of your sexual harassment
19 and pregnancy claims likely being out. Stage your discovery in
20 a way that makes sense, recognizing that you've got to work
21 together because June 19th is not that far away, and I'm
22 telling you it's a firm date. The end of July I can do this
23 trial. I don't want to push it much beyond that. This should
24 not be a long trial. But we all know that with Spanish
25 speaking witnesses everything slows down. So this is not going

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Motion

1 to be a two day FSLA case. So I want to get this case tried,
2 and my window to do that is the end of July. So I've worked
3 backwards off that date to set all the balance of these dates,
4 which means your discovery deadline is a firm deadline. If you
5 run into problems and you're doing the best you can to work
6 collaboratively and cooperatively and can't work it out, don't
7 let it fester. Bring to it to my attention earlier rather than
8 later so that you're not on June 5th saying, oh, we have this
9 huge problem and we can't possibly get all this done because we
10 have this problem that hasn't been worked out yet. Okay?

11 MR. RESTITUYO: Yes, your Honor.

12 THE COURT: Yes.

13 MS. MIRER: The only thing I did think of is that
14 there is a strong issue with respect to the tip requirements
15 for tipped workers and that may be a subject of a summary
16 judgment motion with respect to the tip workers.

17 THE COURT: That is that they don't have the right
18 records --

19 MS. MIRER: Exactly.

20 THE COURT: -- showing the tip credit?

21 MS. MIRER: Exactly.

22 THE COURT: Do you know, did they keep appropriate
23 records relative to tip credit?

24 MR. RESTITUYO: Your Honor, we may very well be moving
25 for summary judgment after we provide the records, so --

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Motion

1 THE COURT: You may.

2 MR. RESTITUYO: I mean, so.

3 THE COURT: You may.

4 MR. RESTITUYO: There seems to be some presumption
5 that we wouldn't move, but --

6 THE COURT: You can both move.

7 MR. RESTITUYO: Right.

8 THE COURT: You can cross move.

9 MR. RESTITUYO: So we're going to provide discovery as
10 we would and in cooperation and without dispute and --

11 THE COURT: Great. Just in terms of staging the
12 discovery, I don't set rules on who goes first and who does
13 that. Just work it out. You're going to have to be doing a
14 lot of this in parallel, because otherwise you're never going
15 to make the deadline.

16 MS. MIRER: Your Honor, we will resubmit by certainly
17 Monday or Tuesday next week our discovery request to them and
18 that should run the 30 days from when we need the information.

19 THE COURT: Again, that's the sort of thing that I
20 would recommend you and Mr. Restituyo talking to each other, as
21 opposed to you simply serving them when I've just laid out a
22 whole bunch of work for all of you. So the question is is that
23 the most collaborative way of doing it, or is there a way that
24 you could work together to say, let's talk about what you got,
25 let's talk about what you need, here's -- and work it out

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Motion

1 together. That's all I'm saying.

2 MS. MIRER: Your Honor, it would be my hope to be able
3 to talk to Mr. Restituyo. Unfortunately, there are times when
4 I cannot get a call back, so.

5 THE COURT: Okay. Call her back.

6 Just, both of you, this should be like, you know, I
7 need a big reset button. Reset the relationship. You are
8 going to have to work together collaboratively or both of your
9 clients are going to suffer. I mean, I can't say it more
10 clearly than that.

11 I understand your clients' position and I understand
12 her clients' position. You're the professionals, you're the
13 one who needs to rise above it all. Work collaboratively and
14 cooperatively in order to get to where we need to go. Okay?

15 MR. RESTITUYO: Your Honor --

16 THE COURT: I'm not -- look, I'm not --

17 MR. RESTITUYO: No, no.

18 THE COURT: Understand something. I do not hold
19 either of you primarily responsible or not primarily
20 responsible. I don't care. All I'm saying is work together,
21 or all of your clients are going to suffer, okay.

22 All right, anything further?

23 MR. RESTITUYO: No, your Honor.

24 THE COURT: Anything further?

25 MR. RESTITUYO: Oh, yes, your Honor. And actually

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Motion

1 this should be addressed by my colleague.

2 MR. RODRIGUEZ: Your Honor, with respect to -- you
3 ordered that the videos in the RICO action be transcribed.

4 THE COURT: Yes.

5 MR. RODRIGUEZ: If it's okay that I address that? I
6 wanted to ask for an extra day or two. We have an SDNY
7 interpreter doing the transcription, but I haven't received an
8 update from her.

9 THE COURT: Okay.

10 MR. RODRIGUEZ: But I expect that in the next day or
11 two.

12 THE COURT: Okay.

13 MR. RESTITUYO: To be clear, your Honor, she told us
14 she would have it last night. And so as of the time that we
15 came into court and gave up our cell phones, we hadn't received
16 the update.

17 THE COURT: All right. That's fine. So if you report
18 back to the Court when you think we're going to get it.

19 MS. MIRER: We provided them last night our
20 transcriptions, so we'll -- hopefully we'll hear from them if
21 they accept them.

22 THE COURT: Okay. Essentially you've got two people
23 translating the same videotape.

24 MS. MIRER: No, no. No, no. We had --

25 THE COURT: Divided up?

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Motion

1 MS. MIRER: No. We transcribe the ones that we
2 submitted.

3 THE COURT: Okay.

4 MS. MIRER: The videos we submitted and we had an
5 outside person do it.

6 THE COURT: Okay.

7 MS. MIRER: So, and we've provided them the
8 transcripts for them to determine whether they agreed.

9 THE COURT: Okay. And you transcribed -- you've got
10 the SDNY interpreter working on the tapes that you submitted;
11 is that right?

12 MR. RODRIGUEZ: Yes.

13 THE COURT: Okay.

14 Okay. So when did i originally say they were due?

15 MS. MIRER: Friday.

16 THE COURT: Friday? So you're asking -- okay, so I'll
17 adjourn that till the 18th. Okay.

18 MS. MIRER: Does that include us as well?

19 THE COURT: Yes.

20 MS. MIRER: Okay.

21 THE COURT: Everybody. All right, thank you. Okay,
22 thank you.

23 MR. RESTITUYO: Thank you.

24 MR. RODRIGUEZ: Thank you.

25 (Adjourned)